IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 1079

LUCY B. BROOKE,
Petitioner

v.

CITY OF NORFOLK, ET ALS.,
Respondents

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

REPLY BRIEF ON BEHALF OF THE PETITIONER

NATHANIEL T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

Richmond, Virginia,
January 17, 1928.

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A few of the statements made in the brief for the Commonwealth, just filed herein, seem to require reply.

(1) At pages 2 and 3 of the brief it is said that while it appears that the application made herein to the Corporation Court for the city of Norfolk for relief against erroneous assessments for the year 1923 appears to have been filed within two years from the first day of Sep-

tember in the year in which the assessments were made, as required by Code of Virginia, secs. 2385 and 2389, the contrary appears as to the application in respect of the assessments for 1924. Even if this court were disposed to entertain a question never before raised in the case, it is sufficient to say that the statement is palpably incorrect. Counsel for the Commonwealth refer to page 20 of the record as sustaining their point. What is found there is the *order* on the application. At page 15 it distinctly appears that the application was filed on August 2, 1926, well within the two-year period from September 1, 1924.

(2) At page 4 of the brief, a number of cases are cited to the proposition that a general gift of the income of a fund is equivalent to a gift of the property itself. We do not know the purpose of the citations. If it be intended to say—and this is what the cited cases hold—that an *unlimited* gift of income passes the principal, the statement, while correct, is academic, as no such case is presented here. If it be intended to say that on a gift of the income as a life estate, with a gift over of the principal, the holder of the life estate is taxable, in respect of the principal, we would say that this is without doubt the law of Virginia, and, as attempted to be applied in this case, explains our presence in this court. But the authorities cited on this point are without bearing on the question whether this law of Virginia, so attempted to be applied in respect of securities held by law without the State, is valid; and this is the sole question here. Nor is the "policy" of Virginia, alluded to on page 6 of the brief, nor its doctrine, as expounded in pages 6 to 12, of

importance when in contravention of the Constitution of the United States.

(3) The brief cites no other cases not cited in our opening brief, except *Hunt* v. *Perry*, 165 Mass. 287, and *Lewis* v. *County of Chester*, 60 Pa. St. 325. Of these, the first is in point and supports the position of the Commonwealth, but it is worth while to observe that the Massachusetts court in *Maguire* v. *Trefry*, 230 Mass. 503, recognized that some of the expressions used in it "cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194; *Delaware, etc., R. Co.* v. *Pennsylvania*, 198 U. S. 341, and *Louisville and Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385." It is true, however, that the Massachusetts court held, and was sustained by this court in holding, that the *income* tax there in question was valid. The question decided in *Hunt* v. *Perry*, however, has not been decided in this court, and is before it in this case.

On the other hand, *Lewis* v. *County of Chester, supra*, does not decide that question at all. All it holds is that a New York trustee, removing to Pennsylvania and there investing a part of the trust estate in Pennsylvania mortgages, is liable to Pennsylvania taxes *on the Pennsylvania mortgages*, but not on the rest of the trust estate. The case expressly leaves undecided the question as to the taxability in Pennsylvania of the beneficiary.

(4) All the Virginia cases cited by counsel were referred to by us in our brief; and we did not leave to "inference" our conviction that such of them as present the question here involved were wrongly decided. We

undertook to point out how the court fell into error; we left no doubt as to our conviction that it did so.

(5) The statement at page 13 of the brief that the question for consideration here "narrows itself down to the proposition: 'Does the fourteenth amendment to the Federal Constitution compel the several States to adopt retrospective forms of taxation,'" is, frankly, beyond our comprehension. We have never before heard it suggested that the fourteenth amendment compels any State to adopt any form of taxation, or, for that matter, to levy taxes at all. It is surely unnecessary to say to this court that our reliance upon the amendment is as invalidating the tax complained of here, not as "compelling" some other tax not levied and not complained of.

(6) The brief discusses no case from this court except *Fidelity, etc., Co.* v. *Louisville*, 245 U. S. 54, from which a long quotation is made. That was a case where a taxpayer voluntarily kept intangibles in a State other than that of his residence, as pointed out at pp. 15 and 16 of our opening brief; and is, consequently, not in point here.

It is respectfully urged that the brief fails to meet the argument which we have presented.

Respectfully submitted,

NATHANIEL T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

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IN THE

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CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, W. I. GILKESON, AND THE COMMONWEALTH OF VIRGINIA,
RESPONDENTS

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

COMMONWEALTH OF VIRGINIA,

By E. WARREN WALL,
Counsel Department of Taxation, of Counsel.

Richmond, Virginia,
January 18, 1928.

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RESPONDENTS

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

THE FACTS

Lucy B. Brooke, a citizen and resident of the city of Norfolk in the State of Virginia, is the beneficiary of a trust fund amounting to $80,000, invested in intangible personal property, which property is held for her exclusive benefit by the Safe Deposit and Trust Company of

Baltimore, trustee, the entire net income being paid to her each year. This trustee is a corporation of the State of Maryland, with its principal office in the city of Baltimore of that State.

The Commonwealth of Virginia, in order to raise revenue for the support of its government, imposes a classified property tax upon all intangible property the beneficial interest of which is owned by its residents. The city of Norfolk also, during the years in question, imposed a property tax on intangible personal property owned by residents of that city. The Commonwealth of Virginia, in addition, imposes a general income tax upon all income received by its citizens.

During the years 1923 and 1924, the Commonwealth of Virginia, in computing the income taxes due by the said Lucy B. Brooke, included in the assessment the income derived by her from the trust fund aforesaid, and also included $65,920 as the value of the corpus of the said trust fund in computing her personal property taxes. Within the time required by law, the said Lucy B. Brooke applied to the corporation court of the city of Norfolk for exoneration from the assessment made against her for the year 1923 (Record, page 14). Said application, however, was not made within the time required by law with respect to the taxes assessed for the year 1924. No complaint was made touching the authority of the Commonwealth to impose taxes upon the income received by the petitioner from the trust fund in question. It is, in fact, admitted by counsel for the petitioner (Brief, page 17) that, under the authority of *Maguire* v. *Trefry*, 253

U. S. 12, 64 L. Ed. 739, 40 Sup. C. 417, the Commonwealth of Virginia has plenary power to tax the income derived from this fund. The contention is simply that, in measuring the personal charge, which is imposed by law in the nature of a property tax assessable against the petitioner, the Commonwealth is forbidden to consider the value of her interest in that portion of her intangible property which is held in trust for her in Baltimore.

ARGUMENT

Certiorari Should be Dismissed With Respect to the Assessment For 1924

It plainly appears from the record, page 20, that prior to November 20, 1926, no application was made to the Corporation Court of the city of Norfolk for exoneration from the assessment of taxes made in and for the year 1924. It does not appear from the record that any petition for correction was previously filed in the clerk's office. The Virginia statute providing for exoneration from alleged erroneous assessment, Code section 2385, provides that any person assessed with taxes on property, aggrieved by such assemment, may, within two years from the first day of September of the year in which such assessment is made, apply for relief to the court in which the officer who made the assessment gave bond and qualified. This statute was construed by the Supreme Court of Appeals of Virginia in *Leesburg* v. *Loudoun National Bank*, 141 Va. 244, in which the court held that it was not sufficient that notice of the purpose

to apply for such correction was given within the two years. The court says in this case:

> "We think the language of the statute is conclusive on this point, and that the application must be actually made, and made direct to the court, within two years from September 1st of the year in which the assessment was made."

TAX CLEARLY RIGHT

It is difficult to perceive upon what ground the authority of the Commonwealth of Virginia to include the value of the funds held in trust for the petitioner along with the value of her other property can be drawn in question. It is true that the precise point does not seem to have been passed upon by this honorable court except by inference. However, this right has been firmly established by a long line of decisions by the courts of last resort of the several States.

In the case of personal property, it has been repeatedly held that a general gift or bequest of the income is in contemplation of law equivalent to a gift of the property itself, that the principal of the fund passes by a gift of the income therefrom.

Elton v. *Sheppard*, 1 Bro. Ch. (Perkins' Ed.) 463; *Adamson* v. *Armitage*, 19 Ves. Jr. (Sumner's Ed.) 416, 418; *Stretch* v. *Watkins*, 1 Madd. 253, 258; *Clough* v. *Wynne*, 2 Madd. 188, 191; *Haig* v. *Swiney*, 1 Sim. & Stu. 487, 490; *Humphrey* v. *Humphrey*, 1 Sim. N. S.

536, 540; *Southouse* v. *Bate*, 16 Beav. 132, 133; *Peale* v. *White*, 7 La. Ann. 449-451; *Jenings* v. *Baily*, 17 Beav. 118, 120; *Collier* v. *Collier*, 3 Ohio St. 369, 374; *Stone* v. *North*, 41 Me. 265, 271; *Hatcher* v. *Bassett*, 52 N. Y. 359, 362; *Pennsylvania Co. for Ins. on Lives and Granting Annuities' App.*, 83 Pa. 312, 315; *Millard's App.*, 87 Pa. 457, 459; *Sampson* v. *Randall*, 72 Me. 109, 112; *Sproul's App.*, 105 Pa. 438, 441; *Post* v. *Rivers*, 40 N. J. Eq. 21, 22; *Dascomb* v. *Marston*, 80 Me. 223, 231; *Bishop* v. *McClelland*, 44 N. J. Eq. 450, 453; *Lippincott* v. *Pancoast*, 47 N. J. Eq. 21, 26; *Hartson* v. *Elden*, 50 N. J. Eq. 522, 524.

Hunt v. *Perry*, 165 Mass. 287, is identical with the case at bar. In that case the constitutional question was presented that the fund taxed was not within the jurisdiction of the taxing State. The facts in that case were that the testator, a resident of the State of Maine, by his will, probated in that State, bequeathed his intangible personal property to a trustee, a resident of the State of Maine, who kept the evidences of debt in the State of his residence. The beneficiaries were residents of the State of Massachusetts, and that State imposed its taxes not upon the trust fund, but upon the interests of the resident beneficiaries therein. In answering this constitutional question, the court said:

> "This argument rests on the ground that the property is situated out of the State; that the beneficial interest of a *cestui qui trust* is nowhere else made taxable; and that this statute selects for taxation a

kind of interest not otherwise taxable, and so imposes a tax which is disproportionate. This argument, however, is met by the suggestions already made, that the *cestui qui trust* is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the legislature to subject the interest of the *cestui qui trust* to taxation here, if they live here."

To the same effect is *Lewis* v. *County of Chester*, 60 Pa. 325. By a long line of Virginia decisions, it has been held by the State court of last resort that it is the policy of this Commonwealth to tax the interest of all residents in all intangible property owned by them, regardless of the fact that the income from the property may be collected for and paid over to the owner by a trustee, and no matter whether this trustee be a resident or a nonresident of this State.

THE VIRGINIA DOCTRINE

This proposition was first presented to the Supreme Court of Appeals of the State of Virginia in *Selden* v. *Brooke*, 104 Va. 832. In that case the trustee was appointed by the Corporation Court of the city of Norfolk. The trustee was a nonresident of the State of Virginia, but under the terms of the trust he was directed to pay the income to the *cestui qui trust* during her life. The

cestui qui trust, Elizabeth T. Selden, was a citizen of Virginia, and domiciled in the city of Norfolk. The court said (pages 833-834):

> "It is the policy of this Commonwealth to impose taxes upon all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth* v. *Williams,* 102 Va. 778, 47 S. E. 867. But the specific enactment by authority of which these assessments were made is as follows: 'If the property is the separate property *of a person over twenty-one years of age,* or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside * * *. If the property is held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided).' Acts 1897-98, p. 519, amending section 492 of the Code of 1887.
>
> "While the statute may be unskilfully drawn, we are of opinion that by fair construction the case in judgment is obviously within its provisions. The income from the trust fund, upon which the tax is imposed, constitutes, in a certain sense, the separate property of Elizabeth T. Selden, a person over twenty-one years of age, who has a trustee, and resides in the city of Norfolk. The language, 'If

> the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided)' is controlled by the antecedent provision, that whether the person whose property is amenable to tax has or has not a trustee, the property shall 'in either case be listed and taxed in the county or corporation where they reside.' Though the tax is assessed in the name of the trustee, the burden is, in reality, imposed upon the beneficial owner, a resident of the Commonwealth, who enjoys the protection of its laws along with other citizens, and ought, in fairness, to contribute her due proportion of revenue for the support of the government."

The next of these cases to which the attention of the court was directed was *Wise* v. *Commonwealth*, 122 Va. 693. In this case certain real estate in the county of James City, Virginia, had been held by E. C. Boothe, trustee, for use and benefit of Clara H. Boothe, the wife of E. G. Boothe, and their children. In 1906 the said real estate was sold. The funds so derived were turned over to Henry A. Wise, a resident of New York, and another, as trustees for the said Clara H. Boothe for life, with remainder over to the children. The court quoted with approval the case of *Selden* v. *Brooke, supra,* and added (page 698):

> "Not a word is said about the trustee being an appointee of a court of this State or his account-

ability to such court, nor is there an intimation that the result would have been different if the appointment had been by the voluntary act of the parties in or out of the State. Indeed, the last paragraph quoted above would seem to indicate that the result would have been the same if the appointment had been by such voluntary act of the parties."

The court said further (page 700):

"In 17 Ruling Case Law, 620 (citing cases from Iowa, Connecticut, Pennsylvania and other States) the law is stated thus: 'A devise or bequest of the "use and improvement" of property during the life of the devisee, or of the rents, profits and income of the property for life, is in effect a devise of the property itself for life.'

"Independent of precedent, it seems clear that a gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income.

"In the instant case, Mrs. Boothe has an estate for her life in the trust fund in controversy, and as she resides in this State her trustee is properly chargeable here with the taxes from which he seeks relief. It is the duty of the life tenant who receives the entire income to pay the taxes on the corpus.

"This is no hardship on the life tenant. She occupies the same position as any other life tenant

> in this State of intangible personal property. The property in which she has a life is taxable at the place of her residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth* v. *Williams,* 102 Va. 778, 47 S. E. 867. If it were otherwise, citizens of the State could, by creating foreign trusts, deprive the State of a very large part of its revenue."

Simultaneously with the *Wise case, supra,* the Supreme Court of Appeals of the State of Virginia had presented to it the case of *Brooklyn Trust Company* v. *Booker,* 122 Va. 680. The court stated the question presented in that case to be as follows (page 680):

> "Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a nonresident trustee, can this State levy a tax on such fund, when such choses are not now, and never have been, within this State, and the trustee is and always has been a nonresident of this State?"
>
> "This question is answered in the affirmative by *Wise, Trustee* v. *Commonwealth,* 122 Va. 693, this day decided, where the reasons therefor are given."

Again this question came before the Supreme Court of Appeals of the State of Virginia in *Ellett* v. *Commonwealth,* 132 Va. 136, a case in which, like the case of *Brooklyn Trust Company* v. *Booker, supra,* the fund was not and never had been within the territorial limits

of the Commonwealth of Virginia. The court said in that case (page 137):

> "It has been frequently decided that under the tax laws of this State, where a citizen of this State, resident in the State, has a life estate in choses in action held in trust for him by a nonresident trustee, such choses are taxable in this State, although they are not and never have been within this State, and the trustee is not a resident of the State. *Selden* v. *Brooke*, 104 Va. 832, 52 S. E. 632; *Wise* v. *Commonwealth*, 122 Va. 693, 95 S. E. 632; *Brooklyn Trust Co.* v. *Booker*, 122 Va. 680, 95 S. E. 664. In the instant case, the only objection made to the assessment is that, under the provisions of section 492 of the Code, as amended by Acts 1918, page 169, it should have been listed in the name of the trustee and not in that of the life tenant. The cases cited are also authority for the proposition that the tax, though assessed in the name of the trustee, is not against him but against the beneficiary, and the trustee is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. This is undoubtedly so where, as here, the income of the life tenant from the fund is in excess of the tax imposed."

It is thus made clearly to appear that the State of Virginia does not impose any tax upon the *foreign trustee* or the *funds in his hands as such*, and that the tax assessed is simply a personal charge against a resident of the

State, the basis for this charge being the interest of that resident in the intangible personalty held in trust for him. It is pertinent here to inquire, if the Commonwealth of Virginia is forbidden by the Federal Constitution to tax its own citizens and residents on account of their interest in intangible personal property, then upon whom may it impose taxes on account of such ownership?

It appears that the petitioner has no fault to find with the above mentioned line of Virginia cases (record, page 5, brief, pages 33 and 34). On the other hand, the petitioner seeks to distinguish the case at bar from these cases by taking a position that in *Selden* v. *Brooke* and *Wise* v. *Commonwealth, supra*, the fund from which the trust was created originated in Virginia. No attempt is made by the petitioner to distinguish the cases of *Brooklyn Trust Company* v. *Booker* and *Ellett* v. *Commonwealth, supra*, in each of which cases it appears from the opinion of the court that the fund originated outside of Virginia and was held outside the State by a non-resident trustee. In referring to these cases, counsel for the petitioner content themselves with the bald statement that the court seems to have given them little consideration, the inference being that the court was perhaps ill advised in its judgment.

It would be unseemly in the petitioner to criticize adversely the decision in the case of *Wise* v. *Commonwealth, supra*, since this case was affirmed on December 23, 1918, by this honorable court by refusal of certiorari, 248 U. S. 582, 39 Supreme Court 287.

Since it is thus admitted by the petitioner that the Commonwealth of Virginia would have had authority to tax the interest of Mrs. Brooke in the trust fund in question if that trust fund had originated in Virginia, the question for consideration by this honorable court narrows itself down to the proposition: "Does the fourteenth amendment to the Federal Constitution compel the several States to adopt retrospective systems of taxation?" Obviously if, under the Constitution, a State is free so to shape its tax laws that consideration is to be had only of the facts as they present themselves during the year in and for which the tax is levied, then it can make no difference what has been the previous history of the persons and property to whom and to which the taxes are made to apply. That retrospective tax laws are not favored by the courts is too clear to require the citation of authority. It is indeed, then, a unique proposition to argue that a provision to the Federal Constitution so restricts the taxing power of a State that the State is not free to impose its taxes according to conditions as they exist when the tax is to be levied, collected and paid, but must of necessity go back and view conditions as they existed some fourteen years before that time.

THE DOCTRINE OF MOBILIA SEQUENTER PERSONAM

The doctrine of *Mobilia Sequenter Personam*, in its applicability to the ownership of intangible personal property, has been upheld by this honorable court *with respect*

to the rights of the State of domicile in every case which has been heretofore presented to it.

Thus, in *Fidelity and Columbia Trust Company* v. *Louisville,* 245 U. S. 54, 38 Sup. Ct. 40, it appeared that the taxpayer was domiciled in Louisville, Ky., but carried on a business in St. Louis, Missouri.

Deposits coming in from this business were made and kept in a St. Louis bank, subject to taxpayer's order. The question was, whether these deposits could be taken into account in determining the amount of the Louisville tax. The court said:

> "So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this court. *Liverpool and London and Globe Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354, 31 Sup Ct. 550, 55 L. Ed. 762, L. R. A. 1815C, 903. *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853. But liability to taxation in one State does not necessarily exclude liability in another. *Kidd* v. *Alabama,* 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669. *Hawley* v. *Maiden,* 232 U. S. 1, 13, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916 C 842. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person

taxed. Unless it is declared unlawful by authority, we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the values of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558. See also *Tappan* v. *Merchants National Bank*, 19 Wall 490, 22 L. Ed. 189.

"It is true that the decision in *Kirtland* v. *Hotchkiss* concerned Illinois bonds, and that if they were physically present in the taxing State, Connecticut, a special principle might apply, as explained in *Wheeler* v. *Sohmer*, 233 U. S. 434, 438, 3 Sup. Ct. 607, 58 L. Ed. 1030. See *Commissioner of Stamps* v. *Hope* (1891), A. C. 476, 486; Dicey, Confl of Laws (2nd Ed.) 312. But the decision was not made to turn upon such considerations; indeed, its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held that the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it (*Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493), and that the power ought equally to be denied as to debts depending for

their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far, and there is opposed to it the long established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

"The notion that a man's personal property upon his death may be regarded as a universitas and taxed as such, even if qualified, still is recognized both here and in England. *Bullen* v. *Wisconsin*, 240 U. S. 625, 631, 36 Sup. Ct. 473, 60 L. Ed. 830. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 22 Sup. Ct. 515, 46 L. Ed. 697. *Attorney General* v. *Napier*, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland* v. *Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592, 26 L. Ed. 845. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 29, 31, 11 Sup. Ct. 876, 35 L. Ed. 613. *Savings and Loan Society* v. *Multnomah County*, 169 U. S. 421, 431, 18 Sup. Ct. 392, 42 L. Ed. 803. *New Orleans* v. *Stempel*, 176 U. S. 309, 321, 20 Sup. Ct. 110, 44 L. Ed. 174. *Liverpool and London and Globe Ins. Co.* v. *Board of Assessors for the Parish of Orleans*, 221 U. S. 346, 355, 356, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903. It was admitted to apply to debts in *Union Refrigerator Transit Co.* v. *Ken-*

tucky, 199 U. S. 194, 205, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone-Tracy Co.*, 22 U. S. 107, 146, 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1313, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

From the foregoing quotation it is clear that this court has enunciated the following principles to be the law of the land:

1. A State may, in imposing personal charges upon a resident, make that charge commensurate with the citizen's total wealth.

2. That in this total wealth there may be included debts due from citizens of other States.

3. That these debts may be included notwithstanding the fact that the evidences thereof are kept in a foreign State, or that they have a business situs for taxation in that foreign State.

4. That the right to tax possessed by the State of the domicile is in no wise affected by the fact that the State wherein is located the business situs also has the right to tax the debts in question.

In the case at bar, there is no allegation or evidence in the record which would tend to show that the trust fund in question, or any part thereof, has acquired any business

domicile in the State of Maryland or elsewhere. If that State has any authority to tax this fund, it is not on account of any idea of business domicile, or on sole account of the fact that the evidences of debt are held in the city of Baltimore for safekeeping, because the record does not contain any facts to support the former theory, and because the latter theory of taxation has been denounced by this court in *Buch* v. *Beach,* 206 U. S. 392, 51 L. Ed. 1106.

If the State of Maryland possesses any power of taxation over this fund, it must be based upon some notion of the doctrine of *Mobilia Sequenter Personam,* that State viewing as the real owner the trustee which holds the bare legal title. It is unfortunate in this case that the State of Maryland makes a different application of this rule of law from that made by the State of Virginia. Upon analysis it appears that the application of the rule made by the latter State has more to commend it to the conscience, since the beneficiary is the real owner of the fund, the real payer of the tax, the real person to whom governmental protection and advantages are extended.

This principle was clearly recognized and luminously expressed by the Court of Appeals of the State of Maryland, in *Baltimore City* v. *Safe Deposit & Trust Company,* 97 Maryland 659, wherein the court said, with reference to a former case (page 463):

> *"In the absence of any law regulating the imposition and collection of taxes,* the trustee was properly chargeable with the tax."

In deciding the case then before it, the court continued (page 464):

> "When property is held in trust there are two persons, each of whom is in a certain sense its owner. The trustee who holds the title is the owner in a legal and technical sense, but the *cestui qui trust* is the beneficial and substantial owner. We do not think that the legislature has exceeded its power over the subject of taxation or violated any of the provisions of the Bill of Rights or Constitution in providing that personal property of the kind involved in this case shall, for purpose of assessment and taxation, be treated as belonging to its substantial owner and not to its technical holder."

It is, therefore, submitted that the Commonwealth of Virginia has a clear right under the Federal Constitution, when it computes the personal charges which the petitioner should pay as her fair share for the maintenance of the government whose protection she enjoys, to base this charge upon her entire intangible wealth, including the value of her beneficial interest in this trust fund held for her, and that hence the judgment of the Supreme Court of Appeals of the State of Virginia should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,

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Richmond, Virginia,
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